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No. 223.

In the Supreme Court of the United States.

OCTOBER TERM, 1905.

THE UNITED STATES, APPELLANT,

v.

BITTER ROOT DEVELOPMENT COMPANY, ANACONDA MINING COMPANY, ANACONDA COPPER COMPANY, ET AL.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR THE UNITED STATES.

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THE UNITED STATES, APPELLANT,
v.
BITTER ROOT DEVELOPMENT COMPANY, Anaconda Mining Company, Anaconda Copper Company, et al. } No. 223.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

STATEMENT.

This is an appeal from a final decree of the Circuit Court of Appeals for the Ninth Circuit (for opinion see 133 Fed. Rep., p. 274), which affirmed a final decree entered by the Circuit Court, District of Montana, dismissing the bill.

The case was heard on general demurrers filed by Margaret P. Daly, Margaret P. Daly as executrix of the last will and testament of Marcus Daly, deceased, the Anaconda Copper Mining Company, a corporation, and John R. Toole, William W. Dixon, William Scallon, and Daniel J. Hennessy. No service could be had on defendant Bitter Root Development Company,

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Anaconda Mining Company, or Anaconda Copper Company, as they have no officers or offices and are not now in existence.

A fair abstract of the bill of complaint and demurrers is contained in the case reported in the Federal Reporter as above cited and in record, pages 34–38. In the interest of economy and brevity we refrain from repeating the same here

THEORY OF COMPLAINANT'S BILL.

The theory of the bill of complaint is that Marcus Daly, in his lifetime, deliberately formed the purpose of acquiring large amounts of Government timber without paying for it or acquiring the lands upon which it stood. That, to carry out this purpose, he organized the Bitter Root Development Company, owning and controlling practically all of it at all times, and then approached the officers of the Interior Department under a law which then existed, following the repeal of the Timber Culture Act, and obtained permits from said Department to cut 50 per cent of the timber on certain small tracts at different times. That using this as a cover and procuring new ones from time to time in the name of said company he cut over the entire territory described in the bill during a period of ten years, giving out that he had permits to do so and thus covering the cutting of large bodies of timber, under one scheme or another, to which he had no title. That in expectation of the possibility of ultimately being called to account for his misdeeds, he not only organized this Bitter Root Development Company, but after operating it for a

time transferred its entire property and belongings back and forth to different corporations organized for the same general purpose, all of which doings are described in the bill, under such circumstances as practically to constitute himself and said companies and transferees constructive trustees of the Government. That he was thus enabled to acquire, in the course of this series of operations, by various methods and means fairly set forth in the bill, a large body of timber valued at $1,750,000, not by mere trespass upon lands included in the permits, but by fraud, concealment, false representation, and failure to account to the proper officers of the Government as required in the permits, thus covering up his movements and shielding himself from pursuit by the appellant. That as a result of his proceedings, the companies were dissolved or ceased to be objects of pursuit by reason of having no further business or assets and the whole of their operations, their books, records, and other paraphernalia concealed. That by reason of these fraudulent doings he was enabled to swell his estate to the extent of the amount above mentioned, except, perhaps, as he paid portions to the persons conspiring with him and acting under his direction, and that the whole scheme was so carried out as to render pursuit in actions at law practically impossible because of the great multiplicity of suits that would be involved, the impossibility of reaching any assets or collecting any judgments, as well as the impossibility of obtaining, without accounting and discovery, that which belongs to the appellant.

The fundamental source of equity jurisdiction lies in the fraud which raises the constructive trust, but out of the situation naturally grows other remedial elements of jurisdiction of a court of equity, as discovery, accounting, settlement of an estate (Daly having deceased), prevention of multiplicity of suits, and the inadequacy of remedies at law.

ASSIGNMENTS OF ERROR.

The complainant, the United States of America, assigns as grounds of error the following:

I.

The court erred in sustaining the general demurrers to the bill of complaint.

II.

The court erred in not holding that the bill of complaint sets forth sufficient facts and circumstances to invoke the aid of equity.

III.

The court erred in entering a final decree dismissing complainant's bill of complaint.

IV.

The court erred in not overruling said general demurrers, and in not ordering the defendants to answer the complainant's bill of complaint.

V.

The court erred in not holding that the bill shows upon its face that the complainant has no plain, adequate, and complete remedy at law.

VI.

The court erred in not holding that the bill shows on its face that the only forum in which the complainant can have a full, adequate, and complete remedy is in a court of equity.

ARGUMENT.

Until this time defendants have contended that appellant has a complete remedy at law and this contention has been sustained by both courts below.

The rule is that the remedy at law, in order to exclude a concurrent remedy in equity, must be as complete, practicable, and efficient to the ends of justice and its prompt administration as the remedy in equity. (*Boyce's Executors* v. *Grundy*, 3 Peters, 215; *Kilbourn* v. *Sunderlin*, 130 U. S., 514; *Walla Walla* v. *Walla Walla Water Company*, 172 U. S., 112.)

The application of this principle must depend on the character of the case as disclosed by the pleadings and the circumstances of each case. If the remedy at law be doubtful, a court of equity will not decline cognizance of the suit. When equity can give relief complainant ought not to be compelled to speculate upon the chances of his obtaining relief at law. (*Watson* v. *Sutherland*, 5 Wall., 74; *Payne* v. *Hook*, 7 Wall., 425; *Davis* v. *Wakelee*, 156 U. S., 680–688; *Bank of Kentucky* v. *Stone* (C. C. A.), 88 Fed. Rep., 391.)

The mere fact of the existence of a legal remedy which may be made available is not a sufficient objection to the more convenient remedy in equity, and

in many cases the latter court assumes jurisdiction on the grounds of the greater convenience and adaptability of its peculiar machinery. (Cyc. of Law and Proceedure, vol. 1, p. 421, and the many cases there cited; *Russell* v. *Clark's exrs.*, 7 Cr., 69–89; *Wylie* v. *Coxe*, 15 Howard, 415–420; *Jones* v. *Bolles*, 9 Wall., 364–369.)

In *Root* v. *Ry. Co.* (105 U. S., 189), often relied on to support the claim that the aid of equity can not be invoked, Justice Matthews in speaking for the court is careful to say that—

> grounds for equitable relief may arise, other than by way of injunction, where equitable interposition is necessary on account of the impediments which prevent a resort to remedies purely legal, and such an equity may arise out of and inhere in the nature of the account itself springing from special and peculiar circumstances which disable the patentee from a recovery at law altogether, or render his remedy in the legal tribunal difficult, inadequate, and incomplete; and as such cases can not be defined more exactly, each must rest upon its own particular circumstances as furnishing a clear and satisfactory ground for exception from the general rule.

Applying the rule established by these decisions to the bill of complaint in this case, we claim that the court erred in sustaining the demurrer of defendants and in dismissing the bill, because it affirmatively appears on the face of the bill that equitable interposition is necessary on account of impediments which prevent a resort to remedies purely legal; that such impedi-

ments were created by the defendants for the express purpose of disabling the complainant from a recovery at law altogether, or at least making his remedy in the legal tribunal difficult, inadequate, and incomplete.

The court erred in sustaining the demurrer and dismissing the bill for the reason that the defendants, having fraudulently converted the complainant's property, are in equity constructive trustees, and the complainant may follow the avails of such fraud through its various transmutations.

The doctrine of constructive trust, by which one who has been defrauded of his property is treated in equity as a constructive *cestui que* trust and has the right to follow the property of which he has been defrauded into any form it may assume while in the hands of a party to the fraud, and to claim not only the trust *res* and its avails, but also any increase in value by reason of its transmutation of form, is ancient and well settled.

In *McMullen Lumber Company* v. *Strother* (136 Fed. Rep., 295 C. C. A., eighth circuit) at page 305, the court says:

> There is another ground of equitable jurisdiction presented in the bill that is unquestionable. It is alleged that the moneys wrongfully withheld by the defendants, in equity belonged to the complainant, and that the defendant in effect had surreptitiously invested the funds in real estate and personal property. This being so the complainant has the right to follow the funds into any property into which it has been converted. Equity converts the holders of the

> legal title into constructive trustees for the benefit of the equitable owner, and accords to the complainant the option either to take the trust property absolutely, or to enfore against it a lien, to the extent of the amount so converted, citing *Broom Mfg. Co.* v. *Guymon*, 115 Fed., 112, and many other cases.

In Perry on Trusts (ch. 6, sec. 166, 5th ed.), in speaking of how a constructive trust may arise, it is said:

> Thus, if one party procures the legal title to property from another by fraud or misrepresentation or concealment, or if a party makes use of some influential or confidential relation which he holds for the owner of the legal title to obtain such legal title from him upon more advantageous terms than he could otherwise have obtained it, equity will convert such party thus obtaining property into a trustee.
>
> Therefore courts of equity, by raising a constructive trust in cases of fraud, can do equal and complete justice between the parties. By this fiction of a constructive trust courts of equity have great power.

The fact that the property was stolen from the true owner and not obtained by fraud will not affect the question. Equity clearly recognizes that the property always belongs to the true owner, and therefore its proceeds must also belong to him. This has been so held repeatedly.

> *American Sugar Refining Co.* v. *Fancher*, 145 N. Y., 552; 27 L. R. A., 757.
>
> *Newton* v. *Porter*, 5 Lansing, 416; 69 N. Y., 133.

This subject was thoroughly reviewed in New York in *Newton* v. *Porter*, 5 Lansing, 416 (and 69 N. Y., 133). At page 432 Judge Balcom, of the Supreme Court, says:

> If the plaintiff had a remedy at law to bring an action for the money stolen, clearly he would be entitled to equitable relief where the circumstances were such as to require an appeal to the equitable powers of the court. The bonds here had been converted into money, the money into securities, and these securities were held in such a manner and by such varied interests that this would be beyond the reach of any strict legal remedy and only within the comprehensive scope of a bill in equity where all the parties could be brought in and every right protected so as to adjust and determine the entire merits of the case. This remedy is manifestly appropriate and within the jurisdiction of the court in the exercise of its equitable powers.

The syllabus in 69 N. Y. *supra* reads as follows:

> The owner of negotiable securities, stolen and afterwards sold by the thief, may follow and claim the proceeds in the hands of the felonious taker or his assignee with notice; and this right continues and attaches to any securities or property in which the proceeds are invested so long as they can be traced and identified, and the rights of a bona fide purchaser do not intervene. The law will raise a trust *in invitum* out of the transaction in order that the substituted property may be subjected to the purposes of indemnity and recompense.

On page 138, Judge Andrews, for the court, says:

> In courts of equity the doctrine is well settled and is uniformly applied that when a person standing in a fiduciary relation, misapplies or converts a trust fund into another species of property, the beneficiary will be entitled to the property thus acquired. The jurisdiction exercised for the protection of a party defrauded by the misappropriation of property, in violation of a duty, owing by the party making the misappropriation, is exceedingly broad and comprehensive. The doctrine is illustrated and applied most frequently in cases of trusts, where trust moneys have been, by the fraud or violation of duty of the trustee, diverted from the purposes of the trust and converted into other property. In such case a court of equity will follow the trust fund into the property into which it has been converted, and appropriate it for the indemnity of the beneficiary. It is immaterial in what way the change has been made—whether money has been laid out in land, or land has been turned into money, or how the legal title to the converted property may be placed. Equity only stops the pursuit when the means of ascertainment fails, or the rights of bona fide purchasers for value, without notice of the trust, have intervened. The relief will be moulded and adapted to the circumstances of the case, so as to protect the interests and rights of the true owner. (*Lane* v. *Dighton*, Ambler, 409; *Mansell* v. *Mansell*, 2 P. Wms., 679; *Lench* v. *Lench*, 10 Ves., 511; *Lewis* v. *Madocks*, 17 Ves., 49; Perry on Trusts, sec. 829; Story's Eq., sec. 1258.)

It is insisted by the counsel for the defendants that the doctrine which subjects property acquired by the fraudulent misuse of trust moneys by a trustee to the influence of the trust, and converts it into trust property and the wrongdoer into a trustee at the election of the beneficiary, has no application to a case where money or property acquired by felony has been converted into other property. There is, it is said, in such cases, no trust relation between the owner of the stolen property and the thief, and the law will not imply one for the purpose of subjecting the avails of the stolen property to the claim of the owner. It would seem to be an anomaly in the law if the owner who has been deprived of his property by a larceny should be less favorably situated in a court of equity, in respect to his remedy to recover it or the property into which it had been converted, than one, who, by an abuse of trust, has been injured by the wrongful act of a trustee to whom the possession of trust property has been confided. The law in such a case will raise a trust *in invitum* out of the transaction, for the very purpose of subjecting the substituted property to the purposes of indemnity and recompense. "One of the most common cases," remarks Judge Story, "in which a court of equity acts upon the ground of implied trusts *in invitum* is when a party receives money which he can not conscientiously withhold from another party."

The court below said that *Newton* v. *Porter* was not in point, because the defendants therein were insolvent,

and because the bill in this case does not allege that the profits fraudulently obtained by the appellees through the tort complained of have been invested, or are now discovered in some particular form of property which might be charged with a trust *in invitum*.

The answer is that the aid of equity is not to be denied where a case is otherwise made simply because the defendant may be solvent, and simply because at the time the bill is filed the complainant may not have exact information as to the particular property sought to be charged.

In *Angle* v. *Chicago, St. Paul, &c., Railway* (151 U. S., at p. 25), this court, per Mr. Justice Brewer, says:

> Waiving the question as to the solvency of the Omaha company, and assuming that any judgment against it for damages could be fully satisfied by a legal process, there remains a proposition that it is contrary to equity that the defendant should be permitted to enjoy unmolested that particular property the possession of which it sought to secure, and did in fact secure, by its wrongful acts.

In that opinion it is also said:

> It may be conceded that an action at law would lie for the damages sustained by the Portage company through the wrongful acts of the Omaha company.
>
> Indeed that is a fact which underlies this whole case. Yet, while an action at law would lie, it does not follow that such remedy was either full or adequate. * * * While no express trust is affirmed as to the land; yet it is

> familiar doctrine, that a party who acquires title to property wrongfully may be adjudged a trustee *ex maleficio* in respect to that property.
>
> The plaintiff is entitled to the identical securities, the title to which never passed from Williamson to the defendants.
>
> So, if the defendants have sold any of those stocks, the plaintiff is entitled to an accounting for any dividends they may have received from them, as well as their value; and these remedies can only be completely given by an action in equity, in which a reference can be had, and the precise relief to which the plaintiff is entitled given to him.

The court adopts this from Pomeroy Eq. Jur., sec. 155:

> If one party obtains the legal title to property, not only by fraud or violation of confidence or a fiduciary relation, but in any other unconscientious manner, so that he can not equitably retain the property, which really belongs to another, equity carries out its theory of a double ownership, equitable and legal, by impressing a constructive trust upon the property in favor of the one who is in good conscience entitled to it, and who is considered in equity as the beneficial owner.

In *Clews* v. *Jamieson* (182 U. S., 461), at page 479, this court says:

> All possible trusts whether expressed or implied are within the jurisdiction of the chancellor * * * the fact that the relief demanded is a recovery of money only is not important

> in deciding the question as to jurisdiction of equity. The remedies which such a court may give "depend upon the nature and object of the trust; sometimes they are specific in their character, and of a kind which the law courts can not administer, but often they are of the same general kind as those obtained in legal actions, being mere recoveries of money. A court of equity will always, by its decree, declare the rights, interest, or estate of the cestui que trust, and will compel the trustee to do all the specific acts required of him by the terms of the trust. It often happens that the final relief, to be obtained by the cestui que trust, consists in the recovery of money. This remedy the courts of equity will always decree when necessary, whether it is confined to the payment of a single specific sum, or involves an accounting by the trustee for all that he has done in pursuance of the trust, and a distribution of the trust moneys among all the beneficiaries who are entitled to share therein. (1 Pom. Eq. Jur., sec. 158.)

In *American Sugar Refining Company* v. *Fancher* (145 N. Y., 552) the New York Court of Appeals, by Chief Judge Andrews, reaffirms the rule announced in *Newton* v. *Porter* (*supra*). It is said therein:

> The jurisdiction of a court of equity to follow the proceeds of property taken from the true owner by felony, or misapplied by an agent or trustee, and converted into property of another description, and to permit the true owner to take the property in its altered state as

his own, or to hold it as security for the value of the property wrongfully taken or misapplied, or in case the original property or its proceeds have been mingled with that of the wrongdoers in the purchase of other property, to have a charge declared in favor of the person injured to the extent necessary for his indemnity, so long as the rights of bona fide purchasers do not intervene, has been frequently exerted and is a jurisdiction founded upon the plainest principles of reason and justice. * * * Even in case of money, which is said to have no earmark, its identity will not be deemed lost, though it is mingled with other money of the wrongdoer, if it can be shown that it forms a part of the general mass. * * * It often happens in cases of transfer of real estate procured by fraud that, before the action is brought or the plaintiff is apprised of the fraud, the fraudulent vendee has disposed of the land in whole or in part or has created liens thereon in favor of the bona fide purchasers for value. In such cases the court will mold the relief to suit the circumstances and will, at the election of the plaintiff, rescind the contract and compel a reconveyance of the part of the land still remaining in the hands of the vendor and compel the wrongdoer to account for the proceeds of the land sold or award compensation in damages. The court in many cases resorts to the fiction of a trust and, by construction, adjudges that the proceeds in the hands of the wrongdoer are held by him as trustee of the plaintiff.

In *Missouri Broom Manufacturing Company* v. *Guymon* (115 Fed. Rep., 112), it was disclosed by the bill that such part of the broom corn as had not been worked up into brooms had been mingled by the broom company with other broom corn, which rendered it difficult of identification; that the property had been twice sold and that the rights of the alleged purchasers would be a subject-matter for careful investigation. It was also charged in the bill that a part of the commodity had been manufactured into brooms and consigned to third persons, who were acting in collusion with the broom company and who were chargeable, as fraudulent trustees, with the property or the proceeds thereof which they had received.

In answer to the point that an action at law by way of replevin would have furnished an adequate remedy for the wrong complained of, since the property involved was personalty, and hence that a court of equity was without jurisdiction, the court says:

> It is obvious that the complainant could not obtain complete relief by a single action in replevin such as he could obtain by the more flexible processes of a court of equity. Serious obstacles may stand in the way of obtaining adequate redress at law. Besides the fact that the fraudulent vendee, when the election to rescind is made, occupies the position of a trustee, should dispose a court of chancery to assume jurisdiction on the ground of declaring and enforcing the trust.

These decisions, we submit, established the rule on which we rely.

That the rule applies to the bill under consideration will appear from its examination. It is charged in paragraph 8, record page 11, as follows:

> Your orator further shows that in pursuance of such fraudulent conspiracy, for the purpose of carrying out the same, and in order to conceal such action, said Marcus Daly, aided by other parties and as aforesaid, under the name of the Bitter Root Development Company, did at certain times during the several years of said depredations apply to and obtain from the lawful agents of your orator licenses to cut upon certain small portions of the tracts above described, and under cover of such permits said conspirators not only cut, carried away, and manufactured the timber growing upon the lands included in such licenses, but well knowing that such permits gave them no right or authority to enter upon other lands of your orator, then willfully and fraudulently entered upon large tracts of lands adjacent thereto and cut, carried away, drove, and manufactured the timber growing thereon, and afterwards sold the lumber and timber to persons and corporations to your orator unknown and known only to said Marcus Daly, his said agents, and the officers of said Bitter Root Development Company, and appropriated the proceeds of such sales to their own use, but just when such sales were made, just how much the proceeds, to whom besides said Marcus Daly such proceeds were paid, in what proportion, in what way, and at what particular time it is impossible for your orator

to say, as all books of account of every kind and character were then and are now in their possession, under their control, or with their assigns.

A permit typical of all others issued to said Bitter Root Development Company, with the conditions imposed, reads as follows:

Permit to cut timber. United States of America. Department of the Interior. General Land Office.

Whereas, in conformity with the provisions of an act of Congress approved March 3, 1891, entitled, "An act to amend section eight of an act approved March 3, 1891, entitled 'An act to repeal timber-culture laws, and for other purposes,'" and rules and regulations promulgated by the Secretary of the Interior for the execution of said act, the Bitter Root Development Company, of Hamilton, Montana, has made application to cut and remove timber from a portion of the public lands, fully and specifically in said application described, for necessary agricultural and mining purposes, and for manufacturing lumber for domestic uses.

And whereas it is deemed necessary for the public interest that permission be granted unto the said Bitter Root Development Company to cut timber on the lands hereinafter described;

Therefore, under and by virtue of the authority vested by law in the Secretary of the Interior, and subject to all the conditions, restrictions, obligations, and limitations herein contained, permission is hereby granted unto

the said Bitter Root Development Company to cut timber on the public lands for immediate use in the State of Montana, which said timber may be cut on public lands in the county of Missoula, in said State of Montana, within limits particularly described as follows, to wit:

Being certain tracts of public lands, which, when surveyed, will be sections 19 and 30, in township 2 N. of range 20 W., sections 4, 8, 9, 17, 19 and 30 in township 1 N. of range 21 W.; sections 22, 24, 27 and 33, in township 2 N. of range 21 W.; sections 25, 26 and 34 in township 1 N. of range 22 W.; sections 4, 8, and 9 in township 1 S. of range 22 W., principal meridian.

Provided, however, it is expressly stipulated and agreed that the permit hereby granted shall be, and the same is hereby, made subject to the following conditions, restrictions, and limitations, to wit:

1. That this permit and all rights and privileges hereunder shall expire on the 31st day of January, 1896.

2. That no trees shall be cut or removed that are less than sixteen (16) inches in diameter, except such as may be absolutely necessary for making needed roadways through the timber.

3. That in the cutting of timber in the manner and for the purpose set out in the application of said Bitter Root Development Company not to exceed 50 per cent of the timber of each class now growing thereon, and taken as nearly as may be from each acre of the tracts above

described, shall be taken from the lands embraced in this permit.

4. That the said Bitter Root Development Company shall submit monthly, through the register and receiver at Missoula, Mont., a statement under oath, showing the amount of each kind or kinds of timber cut or removed during each month, giving a discription of the particular tract or tracts from which such timber was cut, and stating how much timber was disposed of and to whom.

5. That no timber cut or removed under this permit shall be so cut or removed for transportation out of the State of Montana.

6. That in acting under this permit no timber is to be cut or removed from any tract or tracts covered by the settlement or occupation of any bona fide settler intending to perfect title to such tract or tracts under any of the laws of the United States, nor for any tract or tracts embraced in any reservation of whatsoever kind created by operation of law or proclamation of the President.

7. That all of each tree cut that can be profitably utilized shall be used, and that the said Bitter Root Development Company shall cut, remove, burn, or otherwise safely dispose of the tops and brush of trees, and the tails, slabs, sawdust, and other refuse from their sawmills, with a view to preventing the same remaining food for flames, and that the said Bitter Root Development Company stand liable in damages for the starting or the spread of any fires attributable to their neglect or that of their em-

ployees, in any manner, to comply strictly with this provision.

8. That during the continuance of this permit the said Bitter Root Development Company agree not to purchase timber cut on public land of the United States of any person or persons not having a permit from this Department to cut timber from said public lands, except as provided in section 4 of the circular of May 5, 1891; and they further agree to ascertain affirmatively that persons offering timber for sale have the necessary permit to cut the same if taken from the public lands.

9. That nothing in this permit shall be construed to give to the said Bitter Root Development Company the exclusive right to cut or remove timber from the lands described herein, nor shall the granting of this permit in any way be held to withdraw the lands embraced therein from settlement or occupation and entry by any qualified bona fide claimant.

10. That the right is hereby reserved to modify or revoke at any time the permission hereby granted.

11. That the said Bitter Root Development Company shall be subject to all the rules and regulations under the said act of March 3, 1891, as well as the conditions, restrictions, and limitations herein set forth and such additional rules and regulations as may hereafter be promulgated.

12. In consideration of the granting of this permit, it is expressly stipulated and agreed that the said Bitter Root Development Com-

pany will use all available means to prevent forest fires, and should such fires be started to endeavor to extinguish the same within the limits herein described.

13. That this permit is not transferable, and any attempt to transfer the same will render it void.

(Witness:) W. M. STONE,
Commissioner of the General Land Office.
Approved, February 13, 1893.
JOHN W. NOBLE,
Secretary of the Interior.

The courts, of course, will take judicial notice of this act of Congress and said rules and regulations.

These permits were made expressly subject to the condition, No. 4 *supra*, that the company should submit monthly to the register and receiver at Missoula, Mont., a statement under oath showing amount of each kind or kinds of timber cut or removed during each month, a description of the particular tract or tracts from which said timber was cut or removed, and how much timber was disposed of and to whom. This brings it within the rule governing fiduciary relations, as it embraces both technical fiduciary relations and those informal relations which exist wherever one man trusts in and relies on another. (See *Words and Phrases Judicially Defined*, vol. 3, p. 2761, and cases there cited.)

By reason of the duty of the Bitter Root Development Company to keep true and accurate accounts and monthly submit statements to the officers of the Government, and by reason of its failure so to

do, the proceeds of the lumber retained by it become in its hands trust funds belonging to complainant. There was a breach of this trust; its extent is peculiarly within defendant's knowledge. In such cases choice of remedy is with the party aggrieved, and he may proceed in equity for an accounting and pursue the fund.

This case is governed by the rule declared in *Northern Pacific* v. *Lewis* (162 U. S., 366), as follows:

> Where in any action by the United States against a railroad corporation for the conversion of logs cut from Government lands, the defendant admits the taking, but justifies its action in a suit permitting it to take timber for construction and repair of its railways, the burden of proving that the logs were taken and used in accordance with the suit is upon the defendant.

This rule was reaffirmed in *United States* v. *Denver & R. G. R. R. Co.* (191 U. S., 84).

> In this case it is said upon principle as well as upon authority, a party who has been shown to be prima facie guilty of the trespass, and relies upon a license, must exhibit his license and prove that his acts were justified by it. The practical injustice of a different rule is manifest. It would require the plaintiff not only to establish a negative; that is, that the timber was not cut for the purpose of construction and repair, but to establish it by testimony peculiarly within the knowledge of the defendant. As the cutting in this case was done by agents and servants of the defendant, it would impose upon the plaintiff a difficult if not an

impossible task to require them to show that the timber was not cut for the construction or repair of the railway, though evidence that it was so cut could be readily produced by the defendant. * * * It might be extremely difficult for the prosecution in this class of cases to show that the defendant had not the license required, whereas the latter may prove it without the slightest difficulty. In such cases the law casts upon the defendant not only the burden of producing his license, but of showing that it was broad enough to authorize the acts complained of. (*Commonwealth* v. *Rafferty*, 133 Massachusetts, 574; *Commonwealth* v. *Towle*, 138 Massachusetts, 490.) As the license (the statute in this case) authorized the timber to be cut only for a specific purpose, and the means of proof, as to the purpose for which the timber was cut, were particularly within the knowledge and control of the defendant, we think the burden of producing evidence to that effect devolved upon it.

We are authorized to invoke the aid of equity by reason of the fraud, misrepresentations, and concealments practiced by the defendants.

Fraud in equity includes all willful or intentional acts, omissions, and concealments which involve a breach of either legal or equitable duty, trust, or confidence, and are injurious to another, or by which an undue or unconscientious advantage over another is obtained. (Pom. Eq. Jar. 3d ed., vol. 2, sec. 873.)

The two principal elements of actual fraud are misrepresentation and concealment. At section 912, treating of the English doctrine, Pomeroy says:

> The doctrine is fully settled by an unbroken line of decisions extending to the present day, that, with one remarkable exception (Fraudulent Wills), the jurisdiction of equity exists in and may be extended over *every* case of fraud, whether the primary rights of the parties are legal or equitable, and whether the remedies sought are equitable or simple pecuniary recoveries, and even though courts of law have a concurrent jurisdiction of the case and can administer the same kind of relief. The English judges have virtually said that in every case of fraud the remedy at law, either from the nature of the legal relief itself or from the methods of legal procedure, is inadequate.

This court in *Jones* v. *Bolles* (9 Wall., 369), by Mr. Justice Bradley said:

> It is objected that a court of equity has no jurisdiction of the case because the law affords a complete remedy in damages. The objection is groundless. Equity has always had jurisdiction of fraud, misrepresentation, and concealment, and it does not depend upon discovery.

This settled rule conferring the jurisdiction applies to the case made by the bill. The frauds, misrepresentation, and concealment of the defendants are the very gist of the case.

In paragraph 9, record, page 11, the bill charges:

> That in pursuance of said conspiracy and in the execution thereof, in order to more effectually conceal the same from your orator, its officers and agents, the said Marcus Daly and

the other parties before mentioned engaged the services of a large number of men *falsely* representing that they had authority from your orator to cut the growing timber on tracts of land, *not included in any license*, and made contracts with such men by the terms of which the said conspirators were to pay a certain amount for logs delivered at the river bank by the parties so employed, *by reason of which representations* and contracts a large number of men were induced to cut down trees and haul them as logs to the river bank and transport said logs to the company's mill at Hamilton, and thereby innocently aided the conspirators in their unlawful acts and enabled them to successfully prosecute the same.

In paragraph 11:

> Your orator further shows that the said Marcus Daly and his associates, in further execution of said conspiracy, organized other corporations for the purpose of *concealing* their illegal acts and complicating and confusing the situation so as to make detection and proof of the same difficult, if not impossible.

Paragraphs 11, 12, 13, 14, 15, and 16 set forth in detail said corporations.

In paragraph 17 of the bill it is said:

> Said defendants, or some of them, have had at all times, and now have, possession of the sawmill at Hamilton, wherein the logs were converted into lumber, and they have received all the proceeds of said sales and divided the same among them, but by reason of the frauds

> practiced by said defendants as aforesaid, and their acts performed *for the express purpose of concealing* from your orator the facts of the case, by means of the formation and the dissolving and the reforming of corporations and by reason of said defendants having possession of all books of account it is impossible for your orator to give to a greater extent the details of this conspiracy, or to show just when or by whom the particular acts of spoliation were performed, or just where and to whom the logs, when manufactured into lumber, were sold, or just when and by whom the proceeds thereof were obtained and when the same were divided.

We submit that these and other paragraphs of the bill make out a case within the rule and are a complete answer to the appellee's claim that the charges therein contained are general, uncertain, and indefinite.

The facts of the case were set forth as fully as we were able to do at the time the bill was drawn. Had the concealments alleged in the bill and the complications devised for the express purpose of preventing knowledge not been so great, we would have more exact knowledge of the details of this fraud and could have stated them more fully in the bill, but the objection of the appellees is not good in law, as the rule is this:

> While every material fact to which plaintiff means to offer evidence ought to be distinctly stated, a general statement of the matter is sufficient. It is not necessary to charge minutely all the circumstances which may conduce to

prove the general charge, for these circumstances are properly matters of evidence which need not be charged in order to put them in as proofs.

Story Eq. Pl., sec. 28.
1 Dan'l Ch. Pr., p. 380.

How can counsel insist, as they do in their demurrers, that the bill does not show how the acts of the defendants were fraudulent, or how the complainant was injured, when they admit (as distinctly alleged in the bill) that $1,700,000 worth of complainant's timber was unlawfully taken by them and converted to their own use?

The court erred in sustaining the demurrer and dismissing the bill because an accounting is necessary.

When an account cannot be justly and fairly taken at law, equity has always had jurisdiction. In *Weymouth* v. *Boyer* (1 Ves. Jr., 424), Mr. Justice Buller, sitting for the chancellor (Lord Thurlow), says:

> We have the authority of Lord Hardwicke that if a case was doubtful, *or the remedy at law difficult*, he would not pronounce against the equity jurisdiction. The same principle has been laid down by Lord Bathurst.

In *Corporation of Carlisle* v. *Wilson* (13 Ves. Jr., 278) the lord chancellor (Erskine) says:

> The principles upon which courts of equity originally entertained suits for an account when a party had a legal title is that, though he might support a suit at law, a court of law either can not give a remedy or can not give so complete a remedy as a court of equity.

Mr. Chief Justice Marshall, in *Fowle* v. *Lawrason's xrs.* (5 Pet., 495, 503), says:

> In all cases in which an action for an account would be the proper remedy at law, and in all cases where a trustee is a party, the jurisdiction of a court of equity is undoubted.

There can be no real doubt that the remedy in equity n cases of account is generally more complete and dequate than it is or can be at law.

> *Kilbourne* v. *Sunderland*, 130 U. S., 505–515; 1st Story Eq. Jur., secs. 450–495; Pomeroy's Eq. Jur., sec. 1421.
>
> *Kirby* v. *Lake Shore Ry.*, 120 U. S., 130, 134.
>
> A suit in equity for an accounting is proper where the accounts are all on one side, but there are circumstances of great complication or difficulties in the way of adequate relief at law.

lso,

> Where a fiduciary relation exists between the parties, and a duty rests upon the defendants to render an account.
>
> Pomeroy, Eq. Jur., 3d ed, vol. 4, sec. 1421, and the many cases there cited.

In the same section the author says:

> The remedy of accounting is in most instances a necessary incident and part of the relief granted in suits brought by those beneficially interested against trustees, either express or implied, and persons standing in fiduciary relations, such as administrators, executors, guardians, directors, and the like.

Professor Tiedman, in his Equity Jurisprudence, at section, 533, says:

> While suits for an accounting are often employed as auxiliary to some general equitable action, courts assume jurisdiction on that ground alone when the legal remedy is inadequate.

In *Fenno et al.* v. *Primrose et al.* (116 Fed. Rep., 49), Judge Pulman, in an able opinion, decides that equity has jurisdiction where its aid was invoked on the sole ground of the complicated nature of the accounts, although the suit was brought by an agent against his principal.

We ask the court to examine particularly *McMullen Lumber Co.* v. *Strother* (C. C. A. 8th Circuit, 136 Fed. Rep., 295), as, in several respects, it bears upon this case. As to the account feature it decides that it is none the less an account that all the items of charge are by one person against another, provided the charges arise out of contract express or implied, or from some duty imposed by law; that equity takes jurisdiction for the adjustment of mutual accounts because of the fact of their intricacy and complications; that where such intricacy exists the mere singleness of the accounting is not controlling, especially in a case where discovery lies and relief is asked thereon, nor in a case where, from the peculiarly complicated transactions, a trial to a jury at law would fall far short of the remedial adequacy of a proceeding in equity.

Such a case as this presents an apt illustration of the reasons which have impelled the justices of the

Supreme Court, time and again, when counsel opposing a resort to the equity side of the court have appealed to the provision of the judiciary act that "suits in equity shall not be sustained in any case where a plain, adequate, and complete remedy may be had at law" (Act September 24, 1789, c. 20, sec. 16, 1 Stat., 82; U. S. Comp. St. 1901, p. 583), to say that the adequate remedy at law must be "as practical and efficient to the ends of justice and its prompt administration as the remedy in equity" to exclude the equitable jurisdiction.

The solicitors for appellees, in the court below, contended that these decisions have no application to this case for the reason that there is no relation between the complainant and the defendants, or any of them, which would support an action for accounting, either at common law or in equity; that defendants are charged in the bill as joint tort feasors, and that complainant's action upon the facts is for trespass or conversion; that to maintain an action for accounting, either at law or in equity, there must be, between the parties, either a privity by contract or consent or a privity in law, such as guardianship, trusteeship, or some other fiduciary relation, but as against a defeasor or mere wrongdoer no action for accounting will lie, and that the fact that the conversion embraces a series of torts, each of which would have to be proven by separate and distinct evidence, does not alter the nature of the case.

The court below in its opinion says:

> It is contended that the bill presents several grounds for equitable relief, one of which is the jurisdiction of a court of equity in matters of accounting. This, it is true, is one of the established grounds of equitable jurisdiction in cases where it is shown that an accounting can not be fairly and adequately had in a court of law, or where there are fiduciary relations between the parties, or where the accounting is incident to recognized equitable relief sought by the bill. But there are no accounts in this case between appellant and appellees. The cause of action, as set forth in the bill, arises wholly in tort. A cause of action arising in tort can not be converted into a cause of action on an account at common law. Nor can the appellant, by resorting to equity, convert its cause of action which arises on the facts disclosed in the bill into a suit in equity for an accounting.

We insist that by so deciding the court ignored the rules of law above stated and in reliance on which the bill was drawn. It failed to recognize the fact that said permits were issued to and received by the defendants on the express condition (condition No. 4 *supra*) that they would submit monthly to the register and receiver at Missoula, Mont., a statement, under oath, showing amount of each kind or kinds of timber cut or removed during each month, a description of the particular tract or tracts from which said timber was cut or removed, and how much timber was removed and to whom.

The court failed to recognize that this duty so to account brings the defendant within the rule *supra*, governing fiduciary relations.

The court failed to recognize that by reason of this duty to account, and the frauds, misrepresentations, and concealments practiced by the defendants under cover of said permits, the proceeds of all the timber unlawfully cut are trust funds for which they must account.

In short, the court rejected the theory of the Government and adopted that of the appellees, viz., that the sole purpose of the bill is to have unliquidated damages for repeated acts of willful trespass ascertained in a court of equity. We submit that in so deciding the court erred.

The court erred in sustaining the demurrer and dismissing the bill for the reason that it shows that the complainant can invoke the aid of equity to avoid a multiplicity of suits.

The fourth ground on which we are warranted in invoking the aid of equity is the avoidance of a multiplicity of suits. The bill shows that the acts committed by the defendants were not simply fugitive and temporary trespasses for which adequate compensation could be obtained in an action at law and the machinery of the law courts found sufficient to reach all the facts in the case; but their acts consisted in a destruction of the corpus of the estate, as almost the sole value of the lands described in the complaint was the value of the timber growing and standing thereon. Acts of destructive waste continued over a

period of ten years, and under such complication of circumstances that no jury, in a law court, could possibly, with the means at hand, investigate the same so as to insure a correct result.

The bill shows that a very large number of actions at law would have to be commenced and tried before anything like the subject-matter of this litigation could be covered. The persons who actually did the cutting are not the same, and the facts and circumstances surrounding the cutting by the several contractors, under whose supervision the cutting was actually done in the interest of the defendants, as set forth in paragraph 9 of the bill, were entirely different, so that each suit would be separate and distinct, but there would be enough similarity in the facts and circumstances to prevent the jury in one case acting in the other, consequently the cases would have to be continued over the terms and the difficulties would prove so great that the prosecution would have to be abandoned.

The Government, in an action at law, could prove the amount of logs cut from a particular description, but on one or more essential points it would fail, because of the lack of proof, to connect the particular trespasses with particular defendants, whereas a chancellor, on reading the entire record and weighing said testimony in the light of all the facts of the case, would be convinced that the men who did the cutting were in the employ of the defendants.

Under these circumstances, adopting the language used by Judge Severens in delivering the opinion of

he Court of Appeals for the Sixth Circuit in *Bailey* v. *Tillinghast* (99 Fed., 801)—

> It is not necessary to rest the equitable jurisdiction over the case upon the fact that the receiver, as the representative of the creditors, is seeking to recover a trust fund, and that there is a complication of interest in the questions and matters involved, for we are clearly of the opinion that the bill should be maintained for the purpose of avoiding a multiplicity of suits, and for this latter purpose it is immaterial whether the suits to be avoided or proven are of a legal or an equitable character. The object is the same in either case, and the reason for the proceedings is the same.

In short, we have here practically the same situation as that presented in *DeForest* v. *Thompson* (40 Fed., 375). In that case Judge Jackson, in delivering the opinion of the court, in which Mr. Justice Harlan concurred, at page 378, said:

> It is a case of one person having a right against a number of persons, which may be determined as to all the parties interested by one suit. If the plaintiffs brought ejectment against one of the defendants and succeeded, the judgment would not conclude the other defendants altogether; the question in each case would be precisely the same. But if the plaintiffs can, by one comprehensive suit, have their rights declared and secured as to all the lands, * * * may they not invoke the jurisdiction of a court of equity upon the familiar ground that by suing

in equity and bringing all of the defendants before the court in one action they can avoid a multiplicity of suits? I think they can.

The necessity for discovery as shown by the statements of the bill is sufficient to give equity jurisdiction.

In this case, as in *Tyler* v. *Savage* (143 U. S., 95), a recovery by the appellant depends largely on the information in the possession of the appellees which is sought by the bill; therefore, in this case, as in that, discovery is one of the grounds for invoking the jurisdiction of equity.

The bill in this case is filed for final relief and the discovery feature is a mere incident thereto.

That bills for discovery and relief inhered in the ancient jurisdiction of courts of chancery in England at the time of the adoption of the Federal judiciary act is beyond question. This being so, the like jurisdiction inheres in the Federal courts, unless abolished by statute, or changed or modified by some rule adopted by this court. No such statute has been passed, and so far from this court having interdicted the practice, its equity rules 40, 41, and 44 expressly recognize the existence of bills of discovery.

If, then, the bill of complaint states a cause for equitable relief, all the points raised by the defendants in their general demurrers relative to the discovery features thereof should be disregarded, for the rule is settled—

That where the bill is filed for the purpose of obtaining final relief, and where discovery is

> only incidental to that end, there can be no demurrer to the discovery only, for the reason that if the discovery be material in support of the relief, and the complainants be entitled to the relief, the defendants must answer.

The following authorities support the above propositions:

> *Ex parte Boyd*, 105 U. S., 647.
>
> *Brown* v. *McDonald*, C. C. A., 3d Cir., 133 Fed., 897; S. C., 68 L. R. A., 462.
>
> *McMullen Lumber Co.* v. *Strother*, C. C. A., 8th Cir.; 136 Fed. Rep., 301.
>
> Bates Fed. Eq. Pro., pp. 128–130.
>
> *Gas Company* v. *Indianapolis*, 90 Fed., 197.
>
> *Rider* v. *Bateman*, 93 Fed., 31.

Adams, in his Equity Jurisprudence, American edition, page 444, says:

> It is this additional ingredient, want of discovery, *caused by the defendant's fault*, which confers a jurisdiction for relief.

But it is said by the defendants in their demurrer that a discovery should not be granted, because true answers to the bill might subject them to a criminal prosecution or accusation or to a penalty of forfeiture. The answer to this objection is this: Mr. Daly is dead, and no charges are made against his executrix, Margaret P. Daly, which would subject her to criminal prosecution or accusation or to a penalty or forfeiture.

As to the defendant corporation, the Anaconda Copper Mining Company, it is settled that it is the duty of a corporation, if required to do so by the bill, to

put in a full, true, and complete answer; and to enable it to do so it must cause diligent examination to be made of all the papers, documents, records, and muniments of title in its possession before answering.

To the point that, since all the officers of a corporation are made competent witnesses by the Federal statutes, there is no longer any reason for allowing a bill for discovery against a corporation, we answer: The corporation, as such, can not be sworn and examined as a witness, and it is apparent that a discovery from these corporations is essential to attain the ends of justice. They possess facts essential to a recovery, which complainant does not possess and can not acquire except by obtaining a discovery through their answers.

The examination of their respective officers as witnesses can in no event be the exact equivalent of a discovery by the corporations themselves under their corporate seals.

> See *Bank* v. *Heilmen*, 66 Fed., 184.
> Pom. Eq. Jur., section 199.
> *Evans* v. *Lancaster*, 64 Fed., 626.
> *McClaskey* v. *Barr*, 40 Fed., 559.

In the words of Pomeroy:

> While it is true that a defendant is never compelled to disclose facts which would tend to incriminate himself, or to expose him to criminal punishment or prosecution or to pains and penalties, fines or forfeitures, * * * this restriction to the right of discovery is subject to special limitations and exceptions necessary in order to promote the ends of justice:

A defendant is always compelled to disclose his frauds and fraudulent practices when such evidence is material to the plaintiff's case, even though the frauds might be so great as to expose the defendant to a prosecution for conspiracy, unless, perhaps, the indictment were actually pending.

Where the liability to a penalty is barred by lapse of time, the defendant can not escape making a discovery. (Pom. Eq. Jur., section 202.)

The complete answer to the point raised, that some of the defendants who aided Daly are his attorneys, and therefore they are not compelled to answer under the discovery demanded, is this:

An attorney, by reason of his professional relation, can not refuse to make a discovery of the facts within his knowledge where it is unlawful for the client to ask and the solicitor to give professional advice, and therefore communications by which fraud is contrived or arranged between a lawyer and a client are wholly excluded from the privilege, and must be divulged.

Pom. Eq. Jur., section 203.

See *Peck* v. *Ashley*, 12 Met., 482.

Where a penalty of forfeiture has at one time attached to the particular act of which a discovery is sought, and the penalty or forfeiture, either by lapse of time or the death of the party, or against whom it may be enforced, or otherwise, the objection to the discovery is thereby removed and the bill is no longer demurra-

ble. Thus, for example, if the statute of limitation for a penalty or forfeiture has expired before the suit was brought, or pending the suit before the discovery is given, the defendant is bound to answer, for he is no longer within the reach of the perils against which the protection is allowed.

> Story Eq. Pl., section 598.
>
> *Corporation of Trinity House* v. *Burge*, 2 Sim., 411.
>
> *Williams* v. *Farrington*, 3 Bro. Ch. R., 38; Anon, 1, Vern., 60.

The Supreme Court of Michigan, in *Warren* v. *Holbrook* (95 Mich., p. 185), at page 189, say:

> The fact that the acts complained of impute to the defendant the commission of a criminal offense, and that, if he were compelled to render an account, evidence might be produced forming the basis of a criminal accusation, does not oust the court of jurisdiction. This is a purely civil proceeding, and the only questions are, Did Holbrook retain money belonging to his employer? And if he did, how much? He could not, of course, be compelled to discover any facts tending to criminate himself, but this does not prevent the trial of the issue made by the pleadings under the rules of evidence in civil actions. (Story Eq. Pl., sec. 525.)

Such is the law. The necessity of applying it to this case appears from inspection of the bill.

The charge is directly made that Daly, and the other defendants named in the bill, carried on the work of spoliation for a period of ten years, and that by reason

of it the Government has lost property to the value of upward of $2,000,000; that during all this period they had, and now have, posession of a sawmill at Hamilton wherein the logs were converted into lumber; they have received all the proceeds of said sales and divided the same among them, all by reason of their fraudulent acts done for the express purpose of concealing the facts of the case by means of the formation, dissolution, and re-formation of corporations and by reason of their having possession of all books of account, it is impossible to set forth to a greater extent the details of the conspiracy complained of or to show just when or by whom the particular acts of spoliation were performed or just when or how the logs when manufactured into lumber were sold or just when and by whom the proceeds were obtained and divided.

It further appears in said bill that the principal conspirator, Marcus Daly, is dead. It is also a fact that the defendant, Bitter Root Development Company, to whom the permits or licenses were issued, has gone out of existence. It now has no officers or office. The same is true with the defendant corporations, the Anaconda Mining Company and the Anaconda Copper Company.

They were organized simply for the purpose of enabling Daly and the other codefendants to obtain possession of the property of the complainant.

It is directly charged that the avails or proceeds of the property of said spoliation is now in their possession, but just how much Mrs. Daly has in her own

person, how much is in the estate of said Daly, and how much each of the other defendants has is not known to the complainant, but is known to said defendants. Under all the circumstances of this case, is it not perfectly apparent to the court that a trial of this case before a jury is utterly impracticable? If compelled to proceed at law, complainant will have no opportunity to ascertain facts in possession of the defendants until the moment of trial. If the complainant should place such of the defendants as are now living and within the jurisdiction of the court on the witness stand, it would be bound by their testimony, as it could not examine said testimony and secure testimony in rebuttal in time for use at the trial.

It is no answer to say the complainant can have the opportunity to examine the books of said defendants. The right to examine the books is one thing, but the right to examine the defendants and their books before an examiner with the assistance of expert accountants, coupled with the right to proceed with that examination from time to time and from day to day, and in the interim to verify the examination as far as it has proceeded—the right to examine the parties in the slow and deliberate way incident to the proceedings before a master in chancery, with that attention to detail and that opportunity to make calculations and comparisons that would be simply impossible in a trial before a jury—is quite another and different thing.

We submit that that which would be feasible and comparatively easy in proceedings before a master would not be possible in a jury trial.

The court erred in sustaining the demurrer and dismissing the bill, for the reason that it shows that the complainant can invoke the aid of equity in adjusting its claim against the estate of Marcus Daly.

Long before Lord Mansfield's decision, in 1776, in *Hambly* v. *Trott* (1 Cowp., 371), the rule had been announced—

> That a court of equity will give effect to a demand against the estate of a deceased person in respect of a wrongful act done by him if the wrongful act has resulted in a benefit capable of being measured pecuniarily, if the demand is of such a nature as can be properly entertained by the court.

In the year 1717 the Lord Chancellor, in *Bishop of Winchester* v. *Knight* (1 Peere Williams, 406), said:

> It would be a reproach to equity to say, where a man has taken my property, as my ore, or timber, and disposed of it in his lifetime, and dies, that in this case I must be without remedy.

Many English cases which sustain our position are reviewed in "English Notes" to *Hambly* v. *Trott*, English Ruling Cases, vol. 2. See also—

Garth v. *Cotton*, 1 Dickens, 183.

S. C. English Reports, Full Reprint, vol. 21, p. 239.

Marquis of Lansdowne v. *Marchioness Dowager of Lansdowne*, 1 Madd., 116.

Phillipps v. *Homfray*, 24 Ch. D., 439; 52 L. J. R. Ch., 833.

Lee v. *Alston*, 1 Br. C. C., 194.

Monypenney v. *Bristow*, 2 Russ. & M., 117.

This rule has always been recognized in this country.

In *Green's administratrix* v. *Creighton et al.* (23 Howard, 90), Mr. Justice Campbell, in delivering the opinion of the court, at page 106 says:

> The questions presented for inquiry in this suit are whether the subject of this suit is properly cognizable in a court of equity, and whether any other court has previously acquired exclusive control over it. The court has jurisdiction of the parties. In the court of chancery executors and administrators are considered as trustees, and that court exercises original control over them in favor of creditors, legatees, and heirs, in reference to the proper execution of their trust. A single creditor has been allowed to sue for his demand in equity and obtained a decree for payment out of the personal estate without taking a general account of the testator's debts (*Attorney-General* v. *Cornthwaite*, 2 Cox, 43; Adams Equity, 257), and the existence of this jurisdiction has been acknowledged in this court and in several of the courts of chancery in the States.

At page 108 it is further said:

> The duty of the administrator arises to pay the debts when their existence is discovered, and the bond is forfeited when that duty is disregarded. The jurisdiction of a court of equity to enforce the bond arises from its jurisdiction over administrators, its disposition to prevent multiplicity of suits, and its power to adapt its decree to the substantial justice of the case.

In *Kennedy* v. *Creswell* (101 U. S., 641–645), Mr. Justice Bradley, in speaking for the court, says:

> The point taken by the appellant that the court below sitting as a court of equity had no jurisdiction of the case is not well taken. The authorities are abundant and well settled that a creditor of a deceased person has a right to go into a court of equity for a discovery of assets and the payment of his debt. When there he will not be turned back to a court of law to establish the validity of his claim. The court, being in rightful possession of the case for a discovery and account, will proceed to a final decree upon all the merits.
>
> The allegations of the bill in this case were sufficient to give the court jurisdiction and the accounts of the executor should show that the complainant had reasonable cause for making these allegations. They went into the court for a discovery of the assets, and the object of the bill was attained by the admission of the executor that he had sufficient assets. It would be strange, indeed, if that admission could be made a ground for depriving the court of its jurisdiction. If it could, the discovery, by proof of assets concealed by the executor, would have the same effect, and the result would be that a bill in equity could be defeated by proofs showing that there were good ground for filing it.

Mr. Pomeroy, in his work on Equity Jurisprudence, vol. 1, sec. 156, says:

> One of the most important subjects to which the theory of trust has been extended is the administration of estates of deceased persons.

> The relations existing between the executors and administrators on the one hand, and the legatees, distributees, and creditors on the other hand, have so many of the features and incidents of an express, active trust that it has been completely embraced within the equitable jurisdiction in England and also in United States.

And then he goes on to say, what is obviously true, namely, that at the common law, although individual creditors might recover judgments at law for the amount of their respective claims, the legal procedure furnished absolutely no means by which the rights and claims of all of the parties in interest could be ascertained and ratably adjusted, the assets proportionably distributed, and the estate finally settled, thus making a resort to a court of equity necessary for a proper administration of the assets.

In *Beverly* v. *Rhodes* (86 Va., 416), it is said:

> The first and principal question arises upon the demurrer to the bill. The appellant insists that the complainant's remedy was at law and that a court of equity has no jurisdiction of the case, but we do not concur in this view. That a single creditor at large of a deceased debtor may sue the personal representative in equity for an account of assets and the payment of his debt is well settled.
>
> The decree for account, however, whether the suit be brought for the plaintiff singly or on behalf of himself and other creditors (for it makes no difference), is for the benefit of all the creditors, and hence all may come in and prove

> their debt before the master and have satisfaction of their demands, equally with the plaintiff in the estate, for all are as parties. In this way a multiplicity of suits is avoided; the assets are marshaled and complete relief afforded. The jurisdiction of a court of equity in such cases is said by some of the authorities to be founded upon the necessity of taking accounts, of compelling a discovery of assets, and because there is no adequate remedy at law. By others it is put upon the ground of a trust in the personal representative which it is the duty of the court of equity to enforce, but whatever may be the reason the jurisdiction is not only well established, but with us it is practically exclusive.

The proper procedure has been declared by this court in *Byers* v. *McAuley* (149 U. S., 608), viz:

> A creditor who is not a citizen of the State of the decedent and his representative can proceed in the United States court against such representative to establish his claim therein by judgment or decree against the representative, and only limits the right by holding that, where the estate of the decedent is being administered in a probate court, the Federal court, after adjudging the validity and amount of the claim, must remit the complainant to the court having possession of the res for distribution.

Martin v. *Fort*, C. C. A., 83 Fed., 19–22.
Wickham v. *Hull*, 60 Fed., 329.
Hale v. *Tyler*, 115 Fed., 838.
Walker v. *Brown*, 165 U. S., p. 655.

These authorities, we contend, conclusively answer the objection of the court below. They establish our claim that Margaret P. Daly, as executrix, is a trustee for the complainants. The court says, in its opinion, "no discovery of the assets of the estate in her hands is required." The prayers of the bill are made for that express purpose.

In conclusion, we submit that the bill shows that the Government has the right to prosecute this suit on the equity side of the court and that the decree of the court below in dismissing the bill was erroneous and that the appellees should answer.

MARSDEN C. BURCH,
Special Assistant to the Attorney-General.
FRED A. MAYNARD,
Special Assistant United States Attorney.

HENRY M. HOYT,
Solicitor-General.

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